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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 412

J. R. MASON,
Petitioner,
vs.
GLENN-COLUSA IRRIGATION DISTRICT,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI AND TO BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent acknowledges service September 5, 1944, of the Petition for a Writ of Certiorari filed herein. We have also received copies of the printed transcript of the Record in the case. This Record is long, as it includes a narrative statement of the testimony

taken at the hearing in the District Court for confirmation of the Plan of Composition of respondent, with the important exhibits, to show how fully conditions in the respondent district were disclosed to the Judge who confirmed the Plan of Composition.

References to the Record will be made by the use of the letter "R", followed by numbers showing the page or pages where the particular matter is covered.

Frequent reference will be made hereafter to the Reconstruction Finance Corporation as "R.F.C."

The decision below is reported in 143 Fed. (2d) 564.

CORRECTIONS IN SUMMARY STATEMENT.

The "Summary Statement of the matter involved" is mainly correct, but it contains some inaccuracies. While the respondent is governed by the California Irrigation District Law, now Division 11 of the State Water Code of 1943, it was not organized under that act, but is a consolidation of two older districts (R. 2-3), as correctly stated at the beginning of the brief in support of the petition. There is considerable in the Record about the indebtedness of one of these old districts, the Williams Irrigation District, but a plan for the composition of that indebtedness has recently been confirmed in another proceeding and it is not involved in this case.

The consolidated district has jurisdiction over the territory in both the former districts, and it will be hereafter referred to as "the District".

WHAT THE PLAN OF COMPOSITION PROVIDED.

On page 4 of the Petition it was said that there is some confusion as to what the Plan of Composition actually provided in the way of payments and how the plan should be interpreted. The plan itself is set forth in full in the Record (R. 2-16) and it is summarized in the Interlocutory Decree confirming it (R. 59-61). It plainly provides for specific payments varying from $690.72 to $612.91 for $1000 bonds, depending on the earliest maturing coupon attached to each bond, and payments of from $18.44 to $20.34 for interest coupons maturing in 1934 and 1935 and detached from bonds. It provides that if any coupons maturing on or after January 1, 1936, are missing from any bond, the face value of such coupon shall be deducted from the payment for that bond, but that a missing coupon shall be paid for if it is subsequently presented. It is plainly stated that part of these payments, amounting to 56.535 cents on the dollar of principal amount of bonds retired, will be obtained from a loan from R.F.C. and the rest will be made up by the District from the proceeds of the sale to R.F.C. of bonds in the amount of $174,800, called "subtreasury bonds", which had been acquired by the District, but never cancelled, or from other sources of income of the District.

It is stated in the resolution setting forth the plan that to evidence the loan from R.F.C., the District has authorized and proposes to issue and deliver to R.F.C. refunding bonds bearing interest at the rate of 4 per cent per annum, *"in a total principal amount equal to*

all of the amounts disbursed from said loan for the retirement of said bonds", and in the meantime the District would pay R.F.C. interest on the amounts disbursed at the rate of 4 per cent per annum from the respective dates of such disbursements until the refunding bonds were delivered. The District did not deliver the 4% bonds. At the time of the hearing on the Plan of Composition it owed R.F.C. approximately $660,943 (R. 246), but it reduced this amount to $425,000 by the use of the proceeds of the sale of land and the use of other assets (R. 133) and issued refunding bonds bearing 3¼ per cent interest and sold them to a San Francisco syndicate for approximately 97.55, thus effecting a saving to the District estimated at about $27,000 (R. 100-101), although there is some question as to the exact amount.

It would seem that the only interpretation of the Plan of Composition that is needed is whether the statement of intention to issue 4% bonds to R.F.C. is such an *integral* part of the plan that the subsequent issuance by the District of 3¼% bonds and their sale to another agency would constitute a justification for denial of a final decree, especially in view of the fact that the resolution of R.F.C. awarding the loan contained the following provision:

> *"However, if the borrower shall before any new bonds are delivered to this corporation, pay or caused to be paid to this corporation an amount equal to the disbursements it has made to or for the benefit of the borrower with 4% interest thereon until paid, this corporation will thereupon surrender or cause to be surrendered the*

Old Securities then held by it or on its behalf to the Borrower." (R. 178.)

Furthermore an affidavit by J. J. Hankins states that the 3¼% bonds were sold with the consent of R.F.C., pursuant to the foregoing provision, and the R.F.C. loan was paid in cash (R. 133-134).

THE DISTRICT COURT'S ERROR.

Judge St. Sure of the District Court, to whom application for a final decree was made, had no difficulty in understanding the plan, for he made an excellent summary of it (R. 142), although he omitted the provision for deductions for missing coupons. He admitted that it provided for paying the creditors from the proceeds of the loan 56.535 cents on the dollar for their bonds, but he seemed to think that this was not an essential part of the plan, for he said that the Judge who confirmed the plan had found it "fair and equitable". However, counsel for Mr. Mason was so persistent in reiterating that it was equitable and possible for the District to borrow $802,500 from R.F.C. that Judge St. Sure came to believe it and said (R. 147) that, while the creditors *"received the percentage of their claims provided for in the plan,* it developed that they may have been entitled to a higher percentage of the consideration offered by the District", *although the District never offered any more than was provided in the Plan.* In the preceding sentence he said:

> "The consideration which the Court found fair and equitable and which the District represented that it was able to pay was not delivered to the creditors."

This shows that Judge St. Sure did not read carefully the Findings of Fact or the Decree confirming the Plan of Composition, *for neither of them found that any consideration but that stated in the Plan was fair and equitable, and we emphatically assert that the District never represented that it was able to pay any more.* Indeed the Findings expressly contain the following:

> "That the payments to be made *as provided in said plan* are the full amount which it is possible for petitioner to pay on its aforesaid indebtedness." (R. 47, Paragraph VI.)

This indebtedness had just been stated to be bonds in the total principal amount of $1,248,453.66. *How then can it be said that the Court found a greater consideration "fair and equitable"?* Both the Findings and the Decree can be read in vain for any such finding. R. 43-55 for the Findings and R. 56-68 for the Decree.

PETITIONER SEEKS REHEARING IN THIS COURT ON FACTS.

It is stated on page 3 of the petition that Judge St. Sure of the District Court decided that the Plan of Composition had not been carried into effect, but the Circuit Court of Appeals, in reversing his deci-

sion, held that there had been no deviation from or substantial modification of the Plan. The petition states that the matter involved is "largely one of law", but it seems to us that it is a question of fact. *Was there or was there not a deviation from the Plan of Composition?* The decision of the Circuit Court of Appeals was based, *not upon lack of legal power to deny a final decree, but on lack of facts to justify the denial of such a decree.*

It would seem, therefore, that the real purpose of the petition is to obtain a rehearing in this Court upon the facts.

OTHER ESSENTIAL FACTS.

At the beginning of the brief in support of the Petition for Certiorari is a statement headed "Factual Background of the Case". The first, third and fourth paragraphs of this statement are correct. While some of the remaining paragraphs are correct and have been or will be admitted, others are inaccurately stated or are positively misleading, and we shall therefore present such facts as we consider essential to a proper understanding of the case.

INDEBTEDNESS OF THE DISTRICT AT VARIOUS TIMES.

In the fifth paragraph of the statement on the "Factual Background of the Case" it is said that upon the consolidation the District became liable for 6% bonds in the aggregate principal amount of

$1,248,453.16 (R. 4). At the hearing on the Plan, April 27, 1939, before the late Judge Louderback (R. 151), this was corrected to show the number of cents "66". It was also made clear that $1,248,453.66 was the amount of bonds outstanding at that time (R. 152.)

The petition for confirmation of the Plan of Composition (R. 4, Paragraph A) shows that upon the consolidation the District became liable for "all of the bonded indebtedness of old Glenn-Colusa Irrigation District", which was then $2,198,950 (R. 158).

On September 27, 1934, when the loan from R.F.C. was awarded (R. 175), $803,800 of these bonds had been retired, for the total indebtedness of the District then was $1,395,150 principal amount of bonds and $19,883.30 of warrants, *making a total indebtedness of $1,415,033.30* (R. 149).

THE LOAN AND HOW IT WAS DISBURSED.

The affidavit of J. J. Hankins (R. 149) shows that the loan was "in an amount not to exceed $802,500", of which $2500 was to be used by the District to meet the cost of refinancing. The resolution is summarized in the narrative statement of testimony taken at the hearing on the Plan of Composition, and it is there stated to be "a loan of not exceeding $802,500" (R. 175). On page 11 of the brief in support of the petition it is said that from the many cases reviewed this Court will doubtless judicially note

that the words "not exceeding" a certain amount is the regular form of designating a loan by R.F.C. *That is true, and there must be a reason for it.* That reason is that loans to refinance distressed public agencies *have never been flat loans,* but "not exceeding" a specified amount, and the amount of the loan has always, so far as we have observed, been a certain percentage of the face value of the bonds purchased by R.F.C., with deductions for missing coupons, and generally the price paid for the bonds varies downward from a fixed maximum if less than all the outstanding bonds are turned in.

In another affidavit (R. 133) Mr. Hankins states that R.F.C. awarded the District a loan *in the total sum of $802,500,* and this was interpreted by Judge St. Sure to mean that the District could have borrowed that amount of money for its creditors. However, as is shown by the resolution awarding the loan, it was not in a specific amount to be disbursed by the District, *but was to be disbursed by R.F.C. in the purchase of outstanding bonds of the District* on a sliding scale with a maximum payment for each bond of 56.535 cents for each dollar of the principal amount thereof (R. 176) *if all of the bonds were delivered to R.F.C.,* and less payments as the percentage of bonds delivered decreased.

If the total indebtedness of the District at that time, $1,415,033.30, is multiplied by the maximum percentage payment 56.535 cents on the dollar the result is $799,989.08, or in round numbers $800,000, to which was added $2500 to meet the cost of refinancing, and

obviously what Mr. Hankins meant when he said that the District was granted a loan by R.F.C. "in the total sum of $802,500", was that this was the maximum amount of it, for it would have been that much if the indebtedness had remained at $1,415,033.30 and all of the bonds and coupons had been turned in. The loan was granted on the terms specified by R.F.C., *and it is clear that the District could not have gone to R.F.C. and got that amount of money.* The disbursement of the loan was always in the hands of R.F.C. and was "to or for the benefit of the borrower through the purchase of securities issued by the borrower" (R. 176). These securities were to be held by R.F.C. and kept alive as security for the loan (R. 177-178). The statement of Mr. Hankins that the loan was "in the total sum of $802,500" must be interpreted in the light of these facts.

After the acceptance of the loan many of the creditors voluntarily turned their bonds in to R.F.C. for the price offered in the resolution, but this price was not acceptable to a majority of the bondholders (R. 11-12). The District then reduced its indebtedness still further by paying off all the warrants and retiring all the bonds and outstanding interest coupons maturing in 1933 and previously (R. 216). This brought the indebtedness of the District down to $1,248,453.66 principal of bonds and the interest coupons thereof which had matured on and after January 1, 1934 (R. 13). Part of this reduction was due to the acceptance of bonds and coupons in payment of assessments under a law that was afterward declared un-

constitutional (R. 215). These bonds and coupons were all cancelled (R. 226).

In the meantime the District had made arrangements to sell to E. M. Garrison $174,800 of bonds, called "subtreasury bonds", which it had acquired but not cancelled, on condition that they be sold to R.F.C. and the proceeds turned over to the District to increase the amounts to be paid to the creditors (R. 12). How these bonds were acquired and the details of their sale were given by the Secretary of the District (R. 229), who said that some additional money was taken from the General Fund to make up the payments guaranteed by the Plan of Composition. This amount at the time of the hearing was $38,646.12 (R. 218-219).

The resolution offering the bondholders these increased payments for their bonds was adopted November 7, 1935 (R. 11-16). It was called a "plan of readjustment", which was the term used in the first Municipal Bankruptcy Act, which was declared unconstitutional in

Ashton v. Cameron Co. Water Imp. Dist. No. 1,
298 U. S. 513, 80 L. Ed. 1309, 56 S. Ct. 892.

The record does not show whether the District brought a proceeding under that act, but counsel for the petitioner knows that it did and that the proceeding was dismissed after the decision in the *Ashton* case. Nevertheless the deposit of bonds continued and R.F.C. made purchases of bonds November 8, 1935, January 22, January 30 and August 13, 1936 and

November 30, 1937 amounting to $1,208,353.66 principal amount of bonds, leaving only, at the time of the hearing before Judge Louderback, $40,100 in bonds that had not been deposited (R. 246). The percentage then held by R.F.C. was 96.79 per cent. As the petition for confirmation of the Plan of Composition was not filed until November 29, 1937 (R. 23), the bonds purchased by R.F.C. on November 30th in the amount of $9000 were probably deposited in the bank before that date. It follows that all the bonds purchased by R.F.C. at the time of the hearing were deposited voluntarily for the acceptance of the prices set out in the resolution of November 7, 1935.

NEARLY 97% OF ORIGINAL BONDHOLDERS ELIMINATED BY CONTRACT.

As the first Municipal Bankruptcy Act providing for "plans of re-adjustment" of indebtedness of public agencies was declared unconstitutional, there was no legal compulsion on bondholders to accept the "plan of re-adjustment", and the purchase of bonds of the District made by R.F.C. as shown by "Debtor's Exhibit 43" (R. 246) *must be held to have been contract transactions.*

"Debtor's Exhibit 26" is a form of escrow agreement under which bonds were deposited with Crocker First National Bank of San Francisco for acceptance of the offer set forth in the resolution of November 7, 1935 (R. 199-200). It provided for the schedule of

payments set forth in the resolution with some additional interest.

"Debtor's Exhibit 27" (R. 201) was a similar escrow agreement used by the First National Bank of Willows for deposits. It provided for payments of only 56.535 cents on the dollar of bonds deposited, and less prices if less than all the bonds were deposited, but the secretary of the District testified that all the bondholders, except Mr. Garrison, who had agreed to sell his bonds for the R.F.C. price, received the amounts specified in the resolution of November 7th no matter where they deposited their bonds (R. 201).

PLAN OF COMPOSITION ADOPTED.

After the present municipal Bankruptcy Act was enacted, the Board of Directors of the District determined to file a petition under it to have the plan set forth in the resolution of November 7, 1935 confirmed as a Plan of Composition. It was accepted by R.F.C. as such a plan September 11, 1937 (R. 16-21). At that time R.F.C. had over 95 per cent of the outstanding bonds (R. 6). The attorneys of the District were authorized to file a petition for the confirmation of the Plan September 16, 1937 (R. 21-23). It was filed November 29, 1937 (R. 23).

In the fourth paragraph on page 11 of the brief in support of the petition it is said that the amount actually made available to the creditors was only $660,943. This statement is positively misleading. "Debtor's

Exhibit 43" (R. 246) shows that $660,943 was the amount disbursed to the creditors *by R.F.C.*, and *in addition* we have shown that they received the proceeds of the sale to R.F.C. of $174,800 of "subtreasury bonds" (R. 229) as well as $38,646.12 out of the General Fund (R. 219), to make up the payments specified in the Plan of Composition.

An answer to the petition for confirmation of the Plan was filed by certain creditors, including J. R. Mason, the petitioner here, by his present counsel (R. 24-42).

THE APPEAL FROM INTERLOCUTORY DECREE.

A hearing on the petition was held (R. 151) and Findings of Fact (R. 43-55) and an Interlocutory Decree confirming the Plan of Composition (R. 56-68) were signed by Judge Louderback April 13, 1940.

The answering creditors promptly appealed.

DISMISSAL OF APPEAL.

On page 10 of the brief in support of the petition it is said the appeal was dismissed, *but it is highly important for this Court to understand the circumstances of the dismissal.* It was by stipulation of counsel for the petitioner here, who also was counsel for the appellants there. He desired to defer the printing of the Record on Appeal from Judger Louderback's decrees and certain other decrees and made motions in

the United States Circuit Court of Appeals for an order extending the time for that purpose (R. 73). When the motions were made Mr. Cook stipulated (R. 74) that petitions for Writs of Certiorari would be filed in the Supreme Court of the United States in the case of West Coast Life Insurance Co. vs. Merced Irrigation District and Newhouse vs. Corcoran Irrigation District, which had recently been decided against him by the Circuit Court of Appeals, and that, if these petitions should be denied or either of them should not be filed, the Circuit Court of Appeals might enter an order dismissing the appeals in the Glenn-Colusa and other cases.

Thereupon the Circuit Court said that *"the Court accepts the above statement and upon the statement of counsel that he and the moving parties will be bound thereby"*, it was ordered that the motions to defer the printing of the Record in each of the cases be granted (R. 74-75).

Certiorari was denied by this Court in the Merced Case, 311 U.S. 718, and rehearing denied, 312 U.S. 714, and Certiorari was denied in the Corcoran Case, 311 U.S. 717, and rehearing denied, 312 U.S. 714. Thereupon mandate was issued dismissing the appeal in the case of Easton vs. Glenn-Colusa Irrigation District (R. 75-77). The mandate gives the name of the appellants (R. 76) and Mr. Mason the petitioner here is one of them. Therefore he is bound by the stipulation and the order dismissing the appeal.

DEPOSIT WITH DISBURSING AGENT.

As heretofore stated, bonds in the amount of $40,-100 had not been purchased by R.F.C. at the time of the hearing (R. 246). After the hearing these bonds began to come in and by September 29, 1941, only $13,100 of bonds and 17 coupons of the face value of $30 each had not been deposited for acceptance of the Plan of Composition, and on that date the District deposited with the disbursing agent of the Court appointed in the interlocutory decree $9,216.87 to pay for these outstanding bonds and coupons (R. 80-83). This deposit was in accordance with the decree, which required the District to deposit with the disbursing agent "the sum necessary to pay the holders of its old bonds, other than bonds which shall have been purchased by R.F.C. as herein provided, the respective amounts to be paid therefor in accordance with said Plan of Composition" (R. 65, Paragraph V). This decree is now *res judicata.*

Mr. Cook in an affidavit admits that this deposit was the correct amount according to the Plan, for he says:

> "It is not denied that technically the amount of moneys provided by the interlocutory decree have been deposited for the creditors, but the opposition to the granting of a final decree is made on other grounds" (R. 288).

APPLICATION FOR FINAL DECREE AND ITS DENIAL.

No disbursements were made by the disbursing agent (R. 82) and on the 8th day of November, 1941 (R. 83) it made its report to the Court and deposited with the Clerk, as required by the Interlocutory Decree, the entire amount paid it by the District (R. 80-81). The Court made an order September 16, 1942, approving the report (R. 94-95).

May 15, 1942, the District filed a petition in the District Court for a final decree (R. 83-87).

After voluminous proceedings (R. 292) the petition was denied June 2, 1943 (R. 293-295).

The District appealed June 11, 1943 (R. 296).

The Circuit Court of Appeals reversed the order denying the final decree June 20, 1944 (R. 311-318).

There are some other statements in what is called "Factual Background of the Case" that are inaccurate or flatly contradicted by the Record, but they will be dealt with hereafter.

THE ARGUMENT.

In the petition for Certiorari, under the heading, *"Questions Presented"*, only four are specified. We shall consider them in order, with any arguments set forth in the petition or the brief which might tend to support them.

THE FIRST QUESTION.

The First Question is a paraphrase of the only reason Judge St. Sure gave in his memorandum of June 2, 1943, for denying a final decree (R. 294-295). It is stated in general terms, but applying it to the District, it may be accurately and more briefly stated as follows:

> If it is equitable and possible for the District to borrow $802,500 from R.F.C. to pay its Creditors, should they not receive this whole amount, and "if the Plan of Composition required the borrowing of only $660,943", is there not such a deviation from and substantial modification of "the plan approved by the interlocutory decree" as warrants a holding that the Plan has not been carried into effect?

Answer: There are two conclusive answers to this question. First, it assumes at least two things that are not true.

a. It was neither equitable nor possible for the District to borrow more than $660,943 to retire the bonds that had been purchased by R.F.C. at the time of the hearing.

Of course it was equitable for the District to borrow all it could to pay its creditors, but this Court will take judicial knowledge of the fact that 1934, when the loan was awarded, was in the depth of the depression, and no agency would have loaned the District money except R.F.C., and the extent to which it would go was defined in the resolution granting the loan, which was introduced at the hearing as "Debtor's Exhibit 12" (R. 175-180). It provided that the loan should be in an amount "not exceeding $802,500", *not to be given in bulk to the District, but to be held by*

R.F.C. and disbursed by it, as we have heretofore shown, in the purchase of bonds at a maximum price of 56.535 cents on the dollar if all the bonds and coupons were deposited, and less prices if all were not delivered.

The assumption that the District could have borrowed $802,500 is based on an affidavit by J. J. Hankins (R. 133) that the District had been granted a loan "in the total sum of $802,500", but the Second Question shows that this was in 1934, when the indebtedness of the District was $1,415,033.30, and that $2500 of the loan was for the use of the District to help meet the cost of refinancing (R. 149). We have heretofore shown that it would have required approximately $800,000 to meet this indebtedness if it had all been paid at the maximum figure. Read in the light of these facts, Mr. Hankins' affidavit is true.

When the resolution of November 7, 1935, was adopted, stating the District's amended plan (R. 11-16) the indebtedness had been reduced to $1,248,-453.66 (R. 12).

Debtor's Exhibit "22" (R. 187-192) was a copy of a resolution by the Board of Directors of the District authorizing the execution of a contract with R.F.C., giving the terms on which R.F.C. would agree to purchase the old bonds of the District. In the contract R.F.C. agrees to purchase "not to exceed $802,500" principal amount of refunding bonds, to be used to refund the outstanding indebtedness of the District and to pay expenses incidental to the refinancing. The

contract also contained a provision *that R.F.C. should be "under no obligation to purchase refunding bonds beyond the amount necessary, in its judgment, for refunding the indebtedness owed to creditors of the Borrower who join in the plan of re-financing contemplated by the resolution of R.F.C. authorizing this loan"* (R. 189).

The resolution of September 27, 1934, awarding the loan, is expressly made a part of the contract by reference (R. 191).

It was testified that the contract had been executed by R.F.C. and the District (R. 187).

Finally at the hearing before Judge Louderback counsel for the objecting creditors, who represents the petitioner here, *refuted the charge that the Plan of Composition has been changed.* He stated at the hearing (R. 186) that R.F.C. *"had offered a loan which would provide for a maximum payment of 56.535 cents on the dollar for the outstanding bonds"*, and that subsequently, when the bondholders did not accept this offer, the Board of Directors of the District *offered an additional payment of approximately $150.00 a bond.* He contended that the District had no right to offer the additional payment, but his statement stands in the record as his own admission that the maximum payment from the loan was only 56.535 cents on the dollar of bonds turned in, and the District had increased this payment by a large amount.

At the time of the hearing $1,208,353.66 principal amount of bonds had been turned in for $660,942.88

and $40,100 of bonds remained outstanding (R. 246). The payment is slightly less than 56.535 cents on the dollar but it should be remembered that the payments would be less if all the bonds were not turned in and that some deductions would be made for missing coupons.

In the opinion of the Circuit Court of Appeals it is said that R.F. C. "fixed its limit of 56.535 cents on the dollar of indebtedness *and never varied its offer*" (R. 316). It is thus clear that *$660,943 was the maximum amount which the District could have borrowed for the retirement of the bonds which had been turned in at the time of the hearing on the plan.* It is immaterial how much it could have borrowed in 1934 when its indebtedness was greater. *The important fact is that the creditors were all paid the specific amounts provided for in the plan of composition.*

b. The plan approved by the interlocutory decree was not different from the plan stated in the resolution of November 7, 1935.

It will be noted that the first question admits that the Plan of Composition actually required the borrowing of only $660,943 but says there was a deviation from the "plan approved by the interlocutory decree". *A reading of this decree will show that it approved the Plan as stated in the resolution of November 7, 1935, and that plan was strictly carried out.* How, then, could there be a deviation from the plan approved by the Interlocutory Decree?

Judge St. Sure evolved a theory that, as Judge Louderback had found the plan fair and equitable

and as opposing counsel had persistently reiterated that it was equitable and possible for the District to borrow $802,500 from R.F.C. to pay its creditors, Judge Louderback must have meant that the creditors ought to receive this amount of money. *We have shown, however, that $660,943 was the maximum amount that could have been borrowed on the bonds turned in at the time of the hearing.* This is an average price of 54.689 cents on the dollar, but it should be remembered that less than all the outstanding bonds had been deposited at the time and some deductions must have been made for missing coupons, which under the plan would reduce the price.

In the third paragraph from the end of the statement in the brief headed "Factual Background of the Case", it is said the District admits the ability to borrow $802,500. The reference to the Record shows that this statement is based on the affidavit by Mr. Hankins that the District was awarded a loan in the total sum of $802,500. We have shown that this was in 1934, when the total indebtedness of the District would have required $800,000 to extinguish it if all the evidences of indebtedness had been turned in, and that $2500 of the amount was to help the District to meet the cost of refinancing.

The District has never admitted its ability to borrow $802,500, but has consistently contended throughout this appeal that the affidavit of Mr. Hankins should be construed as stating the total amount required to retire all of the indebtedness of the District outstanding in 1934.

Second, the matter is res judicata.

The Circuit Court of Appeals disposed of this and other questions raised on the appeal by saying:

> "We hold that the interlocutory decree is *res judicata* as to the matters therein contained", Citing cases (R. 313).

The rule as to *res judicata* is forcefully stated in *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 84 L. Ed. 329, 68 S. Ct. 581, rehearing denied 309 U.S. 695.

This was a case in which a decree confirming a plan of readjustment of the indebtedness of the drainage district was held to be binding on the creditors, although it was rendered under the act which was afterwards declared unconstitutional. It was found that the question of the constitutionality of the statute had not been raised and this Court said that if it had been decided by the District Court in the proceeding, *that determination would have been final save as it was open to direct review upon appeal.*

The remaining question was declared to be whether respondents, having failed to raise the question in the proceeding to which they were parties *and in which they could have raised it and had it finally determined,* were privileged to remain quiet and raise it in a subsequent suit. Mr. Chief Justice Hughes answered this question as follows:

> "Such a view is contrary to the well settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right in the earlier

proceeding, *but also as respects any other available matter which might have been presented to that end.*" (Italics ours.)

As to the conclusiveness of judgments generally, reference is made to annotations in 11 L. Ed. 76, 38 L. Ed. 429 and 42 L. Ed. 355.

In

Jackson v. Irving Trust Co., 311 U.S. 494, 85 L. Ed. 297, 61 S. Ct. 326,

it is said:

"And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree."

As to the consequences of failure to take an appeal when one is allowed, we cite

Bernards v. Johnson, 314 U.S. 19, 86 L. Ed. 11, 62 S. Ct. 30.

On the last page of the decision various questions were raised but this Court found it unnecessary to decide then and said:

"However erroneous the challenged orders, *the remedy for their collection was by timely application for review or timely appeal*". (Italics ours.)

In support of this statement this Court cited

Union Joint Stock Land Bank v. Byerly, 310 U.S. 1, 84 L. Ed. 1041, 60 S. Ct. 773.

This was a bankruptcy case in which there were strong equities in favor of Byerly. This Court ad-

mitted that an order of the District Court allowing the sale of some of his property was erroneous, but it said on page 7 of 210 U.S.:

> "But the Court had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order".

The facts about the loan and the amount actually borrowed to retire the bonds which had been turned in at the hearing were all brought out before Judge Louderback. Section 83(e) of the Bankruptcy Act states *that an appeal may be taken from an interlocutory decree as in equity cases.* We have shown that Mr. Mason was a party to that decree and that an appeal was taken from the decree in which the matters involved in the first question could have been litigated. Therefore, he is conclusively bound by the decree.

THE SECOND QUESTION.

The Second Question assumes some things that are not supported by the Record. It says the Plan of Composition "disbursed only $660,943 to the creditors as the proceeds of the confirmed sale of the debtor's new refunding bonds under the Interlocutory Decree entered in 1940". That decree did not "confirm the sale" of refunding bonds. The refunding bonds referred to in the decree were never sold. The decree is set forth in full (R. 56-68) and merely *authorizes* the District to sell to R.F.C. refunding bonds in an

amount required to pay incidental expenses of the composition "and to pay the sum equal to 56.535 cents on the dollar of principal amount of its outstanding bonds (not purchased by R.F.C.)," and to repay R.F.C. any money expended by it for the purchase of the old bonds of the petitioner as herein provided (R. 63-64, Paragraph III). The decree also authorizes R.F.C. to purchase thereafter any of the old bonds of the District upon the following terms: R.F.C. to pay the sum of 56.535 cents on each dollar of the principal amount of the old bonds, paying nothing on interest of such bonds and deducting for missing coupons as provided in the decree for the purchase of the old bonds by the disbursing agent, and that the District should advance from its own funds "an amount sufficient to pay to each of its creditors who shall so sell such bonds to R.F.C. the difference between the amount to be paid by R.F.C. and the amount to be paid for such old bonds in accordance with said Plan of Composition" (R. 64-65, Paragraph IV).

This refers to the bonds to be purchased by R.F.C. *after the hearing,* and it is extremely important as setting forth Judge Louderback's understanding of *"what the Plan actually provided,* and it confirms the statement in the opinion of the Circuit Court of Appeals, that R.F.C. fixed the limit of the amount it would loan the District "at 56.535 cents on the dollar of indebtedness *and never varied the offer"* (R. 316).

The bonds purchased by R.F.C., as shown in "Debtor's Exhibit 43" (R. 246), *were deposited be-*

fore the petition for confirmation of the Plan of Composition was filed and were purchased by R.F.C. by contract, with the exception of the last $9000 of bonds, when there was no valid law authorizing a bankruptcy proceeding. These are the bonds for which $660,943 in round figures was paid under the terms of the resolution awarding the loan (R. 246). The decree states that at the time R.F.C. accepted the Plan of Composition September 11, 1937 (R. 16-21), it was, and at the time of the hearing still was, the owner of more than 95 per cent of the outstanding bonds (R. 62).

The question further assumes that the Plan of Composition and the Interlocutory Decree provide for the issuance to R.F.C. of 4% refunding bonds in the amount of $660,943 to mature serially, commencing with $14,500 in 1939 and ending with $44,500 in 1968, and R. 188 is referred to. This reference, however, is to the contract between R.F.C. and the District, providing that R.F.C. would purchase "not exceeding $802,500 principal amount of refunding bonds" (R. 187) with the maturities as stated, but limiting the obligation of R.F.C. to purchase refunding bonds to the amount necessary for refunding the District's indebtedness to R.F.C. in accordance with the resolution authorizing the loan (R. 189).

Refunding bonds in the total amount of $802,500, bearing 4 per cent interest, were voted by the District January 15, 1935, as soon as practicable after the loan was awarded. See Debtor's Exhibit 20 "and Debtor's Exhibit 21" (R. 185-186). Neither the Plan of Com-

position, the interlocutory decree nor the contract contains the figures $660,943, but the plan does provide that to evidence the loan from R.F.C. the District *"proposes"* to issue and deliver to R.F.C. refunding bonds "in a total principal amount equal to all of the amounts disbursed from said loan" (R. 15).

If the Second Question were framed to show the pertinent facts, it should state what we have heretofore verified from the Record, including the fact that the District owed R.F.C. $660,943 at the time of the hearing in 1939 (R. 246) but by 1942, and before entry if a final decree, had paid the indebtedness down to $425,000, and then ask:

> "Has not the District Court jurisdiction and power to deny the petition for final decree on the ground that the debtor has not paid its creditors what it fairly and justly should pay?"

In our answer to the First Question we have already shown that $660,943 was all that the District could have borrowed on the bonds turned in at the time of the hearing. Unless the Second Question is a repetition of the First, it must mean that the District should have paid the creditors, instead of R.F.C., the amount necessary to reduce its indebtedness from $660,943 to $425,000. This ignores the fact that R.F.C. had bought and held $1,208,353.66 face value of bonds at the time of the hearing, and the original holders of these bonds were no longer creditors of the District.

The Record does not show the exact amount paid by R.F.C. for the "subtreasury bonds", but they must

have been included in the purchase made by R.F.C. November 8, 1935 (R. 246), for the subsequent purchases were all of small amounts. Dividing the amount paid at that time by the amount of bonds purchased, we get almost exactly 54.7 cents on the dollar as the average price. At that time over 95 per cent and less than 96 per cent of the outstanding bonds had been deposited and the scheduled price was 54.785 cents on the dollar (R. 175), but undoubtedly there were some deductions for missing coupons. If the subtreasury bonds in the amount of $174,800 brought the average price of 54.7 cents on the dollar, the amount realized from them would be $95,615.60, to which must be added $38,646.12, taken from the General Fund (R. 218), making a total of $134,261.72, which the holders of the bonds, other than the subtreasury bonds, that had been surrendered at the time of the hearing received in addition to the price paid by R.F.C. Subtracting the amount of subtreasury bonds, $174,800, from $1,208,353.66, the total amount of bonds purchased at the time of the hearing, we have $1,073,643.66, which shared in the increased payment, or an average of a little more than $125 per $1000 bond. In his statement before the Court (R. 186) Mr. Cook said the District had offered to increase the R.F.C. payment by approximately $150 per bond, but in justice to him, it is proper to say that he was speaking roughly, and $125 is nearer the average increase.

Answer to second question:

a. The Creditors suffered no injury by the payment of R.F.C. from $660,943 down to $425,000, but they received approximately $125 per $1000 more than they would have received if the District had borrowed $802,500 in 1934 and paid off all the then outstanding indebtedness on the R.F.C. terms.

This is clear from the foregoing calculation. The payments to R.F.C. were made in cash from assets of the District revealed at the hearing (R. 196-197, 207, 209-210) and, of course, the assets were depleted by the amount paid. Nevertheless every creditor, except the purchaser of the subtreasury bonds, who had agreed to take only the R.F.C. price (R. 15-16), received the full amount guaranteed in the Plan of Composition (R. 201).

b. How R.F.C. was paid down to $425,000 is easily explained.

In the second point on page 18 of the petition and brief, it is said that how this payment was made "has not been satisfactorily explained" and in the seventh point on page 19 it is said that the District "developed" unexpected or hidden assets in the collection of taxes from 65,000 acres of land sufficient to reduce the debt to $425,000," referring to Record 132. The reference to 65,000 acres of land is at Record 133 in an affidavit by J. J. Hankins. He says nothing about *taxes* from this land, but says that "by leasing land and ultimately selling in excess of 65,000 acres of land, which had been deeded to the debtor for nonpayment of its assessments," it was able to acquire moneys which it used to pay on the indebtedness which it owed to R.F.C. Mr. Hankins does not say that these were the sole sources of payment. Such

moneys were put into the General Fund in various accounts to be drawn out as needed.

In "Debtor's Exhibit 25" was a table (R. 195) showing the acreage of land owned by the District at the end of each of the years 1932 to 1937 and March 1, 1939, just before the hearing (R. 195), and plans for selling this land at $2.00, $4.00, $6.00 or $8.00 an acre according to its quality (R. 196) were explained by H. R. Allard, who had been secretary of the District since its formation (R. 153).

Of course sales of land were made from time to time so that the total acreage owned by the District at the end of each year does not show the total taken by it. This is confirmed by John P. Ryan, a witness for the objecting creditors (R. 263), who testified that sales of land from February 1, 1936, to the time of the hearing amounted to approximately $180,000, including the Spaulding ranch, for which the District received $55,000 (R. 267). This was a ranch of over 11,000 acres which had been sold to the United States for a game refuge (R. 197).

The point of the Second Question seems to be that because the District reduced its loan from $660,943 to $425,000 so quickly it must have been with concealed assets. This is contrary to an emphatic statement of Judge St. Sure February 24, 1943, denying "without prejudice" the motion for a final decree, in which he said:

> *"There is no showing of fraud or misrepresentation on the part of the District"* (R. 145). (Italics ours.)

The Circuit Court of Appeals made a similar statement in its opinion reversing the decision of the District Court, when it said (R. 317):

> "No question of fraud is raised by the proceeding, and, so far as the evidence reveals the conduct of the District's affairs, it would appear that its officers ably and faithfully piloted the District through its distress."

March 1, 1939, the District still had 33,723.15 acres of land which it had taken for delinquent assessments (R. 195).

"Debtor's Exhibit 33" (R. 207-209) was a balance sheet of the District for December 31, 1938, showing that the District then had cash assets in the total amount of $452,610.68, of which $161,087.02 was in an account containing certain money in which the creditors of the old Williams Irrigation District and Reclamation District No. 2047 were entitled to share. The table showed that there was in the General Fund of the District $117,058.68 and in the bond principal fund $69,470.26 and in the bond interest fund $84,674.88. In addition to this the table showed that $20,319.84 was on deposit as an R.F.C. reserve, and the witness stated (R. 210) that he had recommended that $125,000 be deposited in the Federal Reserve Bank to the credit of R.F.C., but that the deposit had not yet been made because of certain questions about the interest to be allowed on it.

Assuming that the lands in the Old Williams Irrigation District owned by the District, amounting to about 7000 acres (R. 162), if sold, should be credited

to the creditors of that District, there would still remain over 25,000 acres of marketable land, and if this could be sold at a net average price of only $4.00 an acre it would bring at least $100,000, to be added to the $125,000 which Mr. Allard had recommended should be deposited to the credit of R.F.C. and $20,000 already on deposit to the credit of that corporation, a total of $245,000 to be credited on the indebtedness of $660,943 to R.F.C., leaving the indebtedness of the District approximately $415,000, or $10,000 less than the amount of the 3¼% bond issue. It is thus clear that *the only question as to the ability of the District to pay its indebtedness to R.F.C. down to at least $425,000 depended on its ability to sell this land.*

The Circuit Court of Appeals in its decision said with regard to the effect of improved conditions in the District:

> "With a greater part of its debt burden removed, with prices for produce greatly improved and the general turn toward prosperity throughout the nation, it is not remarkable that a great improvement was shown in the affairs of the District." (R. 316).

Thus there is no mystery about this payment, and it is clear that Judge Louderback was fully advised of the situation in the District that would make possible the reduction of the R.F.C. debt to at least $425,000.

c. The matters are res judicata.

Under the cases cited in our answer to the First Question, the amount which the District could have borrowed in 1934 and the assets from which it paid down its indebtedness to R.F.C. to $425,000 and all other matters involved in the Second Question were matters of record at the hearing and could have been litigated on the appeal, to which Mr. Mason was a party. This is also true of the amounts to be paid the creditors under the Plan of Composition. Therefore, as the Circuit Court of Appeals held, these matters are *res judicata* (R. 313).

THE THIRD QUESTION.

The statement of the Third Question would have been accurate if it had said that where the Plan of Composition states that the District "proposes" to deliver 4 per cent refunding bonds to R.F.C. (R. 15), and the interlocutory decree confirms the Plan (R. 63) and authorizes the delivery of such bonds to pay incidental expenses of the Corporation and to meet the cost to R.F.C. of bonds already purchased and to be purchased by it (R. 63-64, Paragraph III), but the District, before the entry of Final Decree, is able to and does obtain money at 3¼ per cent and actually issues and sells its new refunding bonds to a new money lender, thus effecting a saving of approximately $27,000, are not the creditors entitled to this saving instead of the debtor?

Answer:

a. **There was no deviation from the Plan of Composition which in any way damaged or affected the rights of any creditor.**

We have admitted in our statement of "essential facts" that the District did not deliver 4 per cent bonds to R.F.C. but did sell 3¼ per cent bonds to a San Francisco syndicate and that "it thereby made a saving", which Mr. Mason estimates at $27,000, although he does not give clearly the basis of his estimate. The exact amount is immaterial here.

The District, at the time of the hearing, owed R.F.C. $660,943 and it paid the debt in hard cash down to $425,000. R.F.C. accepted the money and it alone was affected by the payment.

It was expressly provided in the resolution of 1934 awarding the loan that *if the District should, before any refunding bonds were delivered to R.F.C., pay the full amount then owed to R.F.C., with interest at 4 per cent, R.F.C. would surrender to the District the old securities of the District then held by it.*

This provision is heretofore quoted in full in our statement of essential facts, and in the opinion of the Circuit Court of Appeals (R. 315). The resolution is incorporated by reference in the contract between R.F.C. and the District regarding the refunding bonds (R. 191), and *it is thus evident that it was contemplated from the inception of the loan that the District had the right to pay it off if it could get the money elsewhere.*

As the creditors received the full amounts promised them in the Plan (R. 201), they were not injured by this payment. In

Gentry v. City of Fort Lauderdale, 125 Fed. (2d) 52,

cited in the brief in support of the petition, the Circuit Court of Appeals of the Fifth Circuit held that a certain order that had been made by the District Court was erroneous, but added:

> "It does not follow though that because wrongly based the order must be reversed. Appellants must show more than mere academic error. *They must show injury to them as a result of it.* Appellants, *realizing that this is so,* point to the great reduction in the sinking fund." (Italics ours.)

It was then held that they had been injured by this reduction, and the case was reversed, the Court holding that the requirement of the Plan of Composition for a certain sinking fund was "of the essence of the Composition."

On the other hand, it can make no difference to the creditors where the District gets the money, so long as they receive the full amounts to which they are entitled. How R.F.C. was paid is *not* of the essence of the composition."

In his opinion denying a final decree Judge St. Sure did not mention this point, but rested his denial on the ground that the District failed to borrow $802,500, when he thought it could have done so (R. 294-295).

We have already shown in our answer to the First Question that the District borrowed all it could on the bonds surrendered. In his first decision he said (R. 146) that the creditors "*may*" also be entitled to the saving that the District made by issuing 3¼ per cent bonds instead of 4 per cent, but he never made any positive statement on this point.

b. If the District had not made the saving complained of R.F.C. would have made it and the creditors would not have profited.

R.F.C. was not created as a money lending agency for profit, but to furnish money at less than current rates of interest. If the District had not been protected by the provision allowing it to pay off the loan and conditions developed making it possible to sell its bonds on a 3½ per cent basis, R.F.C., in the exercise of sound business sense, would have sold the 4 per cent refunding bonds at a premium to yield 3¼ per cent, and not even Mr. Mason or his counsel would have been heard to claim the resulting profit for the creditors.

Why, then, should the District be criticised when it accomplishes practically the same result for the benefit of its taxpayers?

c. District proposed to issue 4 per cent bonds in good faith.

When the Plan of Composition was adopted and even at the time of the hearing, no other agency than R.F.C. would have loaned the District money at as low a rate as 4 per cent. Refunding bonds bearing

that rate had been voted in the maximum amount of the loan early in 1935, and to show the creditors that the money to pay them for their bonds was assured the District stated in the Plan that it proposed to borrow most of it from the only source then available and explained how it could make up the rest out of its own funds.

THE FOURTH QUESTION.

In the statement of the Fourth Question there are actually three separate questions presented, which we shall designate as "Question 4a," "Question 4b" and "Question 4c".

Question 4a is that part of the Fourth Question printed on page 5 of the petition, reading as follows:

> "Where the debtor after the date of the interlocutory decree and prior to the entry of a final decree has paid off and discharged the original indebtedness proposed to be composed in the bankruptcy proceedings by obtaining new credit not pursuant to the Plan or the interlocutory decree confirming the Plan, does not the jurisdiction of the Bankruptcy Court to enter a final decree cease and is the Bankruptcy Court not then required to dismiss the proceedings, or as in this case to deny a final decree?"

This question requires some explanation, for counsel for the petitioner seems to be confused about the situation which it attempts to present. In the brief in sup-

port of the petition, point 4 on page 19, he says the debtor has entirely liquidated "the original indebtedness of $1,415,033.30 upon which the whole proceeding is based", and that this was done *"during the course of the proceedings between the date of the entry of the interlocutory decree and the application for discharge"*. We have pointed out in our answer to the First Question that the warrants and some of the bonds constituting this indebtedness when the loan was granted in 1934 were paid *before the Plan of Composition was framed* and that the total indebtedness when the petition for its confirmation was filed *was only $1,248,453.66,* principal amount of bonds, and that only $1,208,353.66 of these bonds had been surrendered to R.F.C. at the time of the hearing, for which, under the terms of the loan, it would pay only $660,943. *All these facts were verified by references to the Record.*

This was the amount of the District's indebtedness to R.F.C. and it is ridiculous to say, as counsel does on page 23 of the brief, that it was never contemplated that the District before it should apply for its discharge "would be able to reduce its indebtedness from $800,000 down to $425,000", because the indebtedness to R.F.C. never was $800,000 and the amount paid off was only $235,943. We have shown in our answer to the Third Question that the resources from which this could be done were fully shown at the hearing.

The indebtedness to be composed under the plan is of three classes. The first class is composed of the

bonds which had been purchased by R.F.C. prior to the hearing, amounting to $1,208,353.66 (R. 246). They were purchased by R.F.C. without legal compulsion on the original owners and were owned by it, subject to the right of the District to pay off the amount invested in the bonds by R.F.C. and get the old bonds.

The only consent to the Plan of Composition was given by R.F.C. (R. 16-21), and it covered bonds in the amount of only $1,197,353.66 (R. 16). The bonds in the amount of $2000 purchased August 13, 1936, and the purchase of $9000 of bonds November 30, 1937, were not included in the consent.

There were bonds in the total principal amount of $40,100 that had not been deposited at the time of the hearing (R. 246). Of these $27,000 had been turned in voluntarily up to September 29, 1941, and they constitute the Second Class. The bonds of the Third Class are those in the principal amount of $13,100 and detached coupons in the total amount of $510 (R. 84), for which $9,216.87 was deposited with the disbursing agent September 29, 1941 (R. 81), and by it deposited with the Clerk of the District Court (R. 80-81).

The bonds of the First Class were the private property of R.F.C., and if it chose to waive any so-called deviation from the Plan and surrender them to the District, no one could complain who was not injured. The original holders of the bonds cannot complain for they sold their bonds to R.F.C. on contract and received every cent promised them.

Question 4a then simmers down to this:

> Where the District in the Plan of Composition "proposed" to issue and deliver 4 per cent bonds to repay its loan from R.F.C. and the interlocutory decree confirmed the Plan and authorized the delivery of bonds, but the District paid off the loan partly out of its own resources and partly by borrowing money at 3¼ per cent from another source, as it had been given the right to do in the resolution awarding the loan, do these facts terminate the jurisdiction of the District Court to enter a final decree?

In point 7 on page 19 of the brief the 65,000 acres of land which the District sold is called "hidden assets," in spite of the fact that Mr. Ryan, a witness for the creditors, testified that the land sales at the time of the hearing had amounted to $180,000 and the District had over 33,000 acres of land still to sell. We have shown that if 20,000 acres of this land could be sold at a net average price of only $4.00 per ace, the money received, together with available cash assets, would be more than enough to reduce the indebtedness to at least $425,000, and these assets were shown to Judge Louderback.

In his first opinion Judge St. Sure said on this point:

> "If the Court knew of these assets, it would seem to amount only to a matter of bookkeeping *whether the creditors were paid through the sale of the assets or by money borrowed on such assets*" (R. 147; Appendix C, attached to petition and brief, page xii). (Italics ours.)

It would therefore seem that payment of part of the debt to R.F.C. with cash instead of bonds would not terminate the jurisdiction to grant a final decree. If the issuance of 4 per cent bonds to pay R.F.C. is thus not "of the essence of the Composition," why should it be fatal to the Court's jurisdiction to issue a final decree if the District uses ordinary business sense and borrows the rest of the money at 3¼ per cent instead of paying R.F.C. 4 per cent, especially when the resolution awarding the loan expressly gave it the right to do so.

Question 4b asks whether a composition is not a contract which, when abandoned or departed from by the debtor, can no longer be enforced.

We emphatically deny that the Plan has been abandoned or deviated from by the District, but assert that *our statement of facts shows a strict adherence to every material detail of it.* The creditors who deposited their bonds were promptly paid the full amounts promised them. R.F.C., which held most of the bonds as security for its loan, was paid in full the amount owed it by the District. Then the District deposited with the disbursing agent, as required by the interlocutory decree, "the sum necessary to pay the holders of its old bonds, other than bonds which shall have been purchased by R.F.C. as herein provided, the respective amounts to be paid therefor in accordance with said Plan of Composition" (R. 65, Paragraph V). Thereupon, as the statute provides, the Plan became binding upon these creditors. The

other creditors had already disposed of their bonds to R.F.C., which had surrendered them to the District and they had been cancelled. The District then applied for a final decree, to which under the statute it was entitled. Section 83(f) of the Bankruptcy Act, providing for a final decree, is printed in full as Appendix A, attached to the petition herein. The form of decree submitted to Judge St. Sure is in strict compliance with the statute (R. 85-87).

Question 4c asks whether the consent of the majority bondholders can survive the liquidation and cancellation of their bonds when cancelled before the entry of a final decree.

In the fifth reason for granting the writ, on pages 6 and 7 of the petition, it is argued that this Court should determine that where the debt represented in the composition has been fully liquidated and cancelled before jurisdiction of the Bankruptcy Court ceases and before final decree, the proceedings should be dismissed.

The answer is that *no consent is required by statute for the entry of a final decree, and there is no reason why there should be.*

See Appendix A, attached to the petition and brief.

We have already shown that the only consent to the Plan of Composition was given by R.F.C. It held its bonds till long after the hearing on the Plan and when the Plan had been confirmed the purpose of its consent was accomplished.

All that is required for the final decree is that the consideration "to be delivered to the creditors under the terms of the Plan shall have been deposited with the Court on such disbursing agent as the Court may appoint or shall otherwise be made available for the creditor". It was made available for them, for every creditor who surrendered his bonds received the full amount promised him in the Plan; and when it became apparent that no more bonds would be surrendered voluntarily, the District, on the 29th day of September, 1941, deposited with the disbursing agent, in strict conformity with the interlocutory decree, "the sum necessary to pay the holders of its old bonds, other than bonds which shall have been purchased by R.F.C. as herein provided, the respective amounts to be paid therefor in accordance with said Plan of Composition" (R. 65, Paragraph V). Thereupon, according to the statute, the Plan became binding upon the holders of these bonds and the District became entitled to a Final Decree. This provision of the Interlocutory Decree is *res judicata. There is no requirement that the consenting creditor or creditors keep their bonds until a final decree is entered.*

It is assumed that the District's debt has been fully liquidated. It is true that all the old bonds, except $13,100 held by the objecting creditors, have been cancelled, but the District still owes $425,000 on the 3¼% bonds issued to pay off R.F.C., less any of those bonds that have matured.

Therefore there is no reason why the jurisdiction of the District Court to issue a final decree has ceased.

PUBLIC INTEREST DOES NOT REQUIRE CERTIORARI.

One of the reasons given for granting the writ is that this Court has never interpreted the statutory requirements for a final decree. It seems to us that the statute is so plain as not to require interpretation. In

Mason v. Merced Irr. Dist., 126 Fed. (2d) 920,

the petitioner here contended that the final decree issued in that case interfered with the governmental powers of the Merced District and the question arose only upon the entry of the final decree. The Circuit Court of Appeals, however, said:

> "Appellant is mistaken. If there was any interference of the nature complained of, the interference was effected by the interlocutory decree. It was that decree which declared the Plan of Composition to be binding on the bondholders and which relieved the district from the necessity of levying taxes to pay the bonds. *The Final Decree determined nothing except that the district had carried the interlocutory decree into effect"* (Italics ours).

A petition for a Writ of Certiorari was denied by this Court (317 U.S. 645), and rehearing was denied (317 U.S. 707). It should be noted that the Interlocutory Decree makes the Plan binding on the creditors on condition that the debtor makes the consideration provided for in the Plan available for the creditors.

EQUITY FOLLOWS THE LAW.

On page 22 of the brief in support of the petition, counsel cites

> *American United Mutual Life Ins. Co. v. City of Avon Park,* 311 U.S. 190, 85 L. Ed. 91, 61 S. Ct. 157,

to the effect that the power of a Bankruptcy Court is not dependant upon the statute as it is a Court of Equity. Nevertheless the decision in that case recognizes that where the law prescribed a practicable procedure *the law must prevail, regardless of any equitable considerations.*

This is expressly held in

> *Securities & Exchange Commission v. U. S. Realty Co.,* 309 U.S. 649, 84 L. Ed. 1203, 60 S. Ct. 724,

in which it was said:

> "A Bankruptcy Court is a Court of equity (Sec. 2, 11 U.S.C.A. Sec. 11), and is guided by equitable doctrines and principles *except insofar as they are inconsistent with the act"* (Italics ours).

Inasmuch as the provisions of the statute regarding a final decree are plain and the District has strictly complied with it and the provisions of the Interlocutory Decree for a final decree, and the form of final decree submitted to the District Court is in strict accordance with the statute (R. 85-87), it should have been signed, as the Circuit Court of Appeals decided.

TWO MATTERS NOT TO BE CONSIDERED.

Complaint is made in the brief in support of the petition that the Findings of Fact are inadequate. This point cannot be considered by this Court for two good reasons:

a. The matter is *res judicata* under the decisions cited in our answer to the First Question.

b. The matter is not mentioned in the petition for the writ.

The same point was raised in

Washington V&M Coach Co. v. National Labor Relations Board, 201 U.S. 142, 81 L. Ed. 965, 57 S. Ct. 648,

and this Court said:

"The petition for certiorari made no mention of any claim with respect to the sufficiency of the evidence to support the findings. In the light of this fact the question is not open for decision here."

A number of cases to the same effect are cited in the margin, and the holding is supported by the provision in Rule 38 of the Rules of this Court that only the questions specifically brought forward by the petition for a Writ of Certiorari will be considered.

This holding also applies to the payment of $12,000 to Nuveen & Co., of which complaint is made in Point 8, on pages 19 and 20 of the brief. *That point is not even hinted at in the Petition for the Writ.*

POWER OF THE DISTRICT COURT.

Although it is suggested in the first part of the Fourth Question presented in the petition that the jurisdiction of the District Court to enter a final decree has been terminated, it is inconsistently argued in Point 4 of the "Reasons for Granting the Writ", on page 6 of the Petition, that this Court should determine that the District Court is empowered to interpret the Interlocutory Decree and even to modify it.

We have not paid much attention to this point because the decision of the Circuit Court of Appeals was not based on lack of power to modify the Interlocutory Decree or to deny a final decree, *but on lack of facts to justify either action.*

Several cases are cited in the brief in support of the petition to show that the District Court has power to modify an Interlocutory Decree of this kind even after the time for an appeal has expired. We believe these cases are inapplicable here in view of the fact that an appeal was taken in this case and dismissed under a solemn stipulation that it might be dismissed if this Court denied petitions for certiorari in two other cases. It did deny both of them, and that ended this case as to all matters raised or which could have been raised on the appeal.

The leading case on the power of the Bankruptcy Court over its judgments is

Wayne United Gas Co. v. Owens Ill. Glass Co., 300 U.S. 131, 137-138, 81 L. Ed. 557, 57 S. Ct. 382.

This was a proceeding for corporate reorganization under Section 77b of the Bankruptcy Act as amended. After stating that a Court of Bankruptcy sits continuously and has no terms, this Court said that it thought the lower Court had the power, for good reason, to revise its judgments upon seasonable application and before rights had vested on the faith of its action, and added that Courts of law and equity have such power limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal. This Court added that there is no controlling reason for denying a similar power to a Court of Bankruptcy or limiting its exercise to the period allowed for appeal. This Court then said:

> "The rule which governs the case is that the Bankruptcy Court in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a re-hearing upon application diligently made and re-hear the case upon the merits; and even though it re-affirms its former action and refuses to enter a decree different from the original one, the order entered upon re-hearing is appealable and the time for appeal runs from its entry".

It then said that two days after the Circuit Court of Appeals dismissed the petition for allowance of appeal from the original order Petitioner notified Respondents of its intention to apply for re-hearing and that prompt application was made and the case was promptly heard.

This is quite different from the action here, where more than three years after the Interlocutory Decree was entered, the District Court denies a final decree and justifies its action on a strained interpretation of the Interlocutory Decree, which could have been made at any time after that decree had been entered if there was any sound reason for it. To put the case more concretely, at the time of the hearing petitioner here knew that the District owed R.F.C. only $660,943. If he thought the District could have borrowed $802,500, he should have promptly made a motion to revise the Interlocutory Decree or litigated the matter on the appeal, to bring himself within the rule quoted above. Instead, he waited nearly three years, until the end of December, 1942 (R. 95-96) and then came forward with an afterthought, which is flatly contradicted by every applicable part of the Record of the hearing before Judge Louderback. If the matter were not already *res judicata,* he should be denied further hearing for lack of diligence.

We shall not prolong this reply by reviewing the cases cited in the brief in support of the writ. When read in the light of the foregoing facts, we find nothing in them to change our belief that the petition for a Writ of Certiorari should be denied.

Dated, Stockton, California,
September 25, 1944.

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